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BADAN PEGUAM MALAYSIA v. YANG BERHORMAT PERDANA MENTERI MALAYSIA, TAN SRI DATO' MAHIADDIN MOHD YASIN & ANOR

FEDERAL COURT, PUTRAJAYA
ABANG ISKANDAR ABANG HASHIM PCA
B [LEAVE APPLICATION NO: 08(i)-428-12-2023(W)]
19 JUNE 2024

Abstract –*The law relating to reference of constitutional questions to the Federal Court is well settled, with the latest decision being that of Dato' Seri Anwar Ibrahim v. Government Of Malaysia & Anor, where it was held that the High Court should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court, as there is no obligation on the part of the High Court, by virtue of the word 'may' in s. 84 of the Courts of Judicature Act 1964, to refer any constitutional question arising before it to the Federal Court. As such, when the High Court exercises its discretion by not referring constitutional questions to the Federal Court because it is empowered to decide on them, that reason alone is valid.*

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CIVIL PROCEDURE: *Appeal – Leave to appeal – Application for – Reference of constitutional questions to Federal Court – Whether constitutional questions fell exclusively within jurisdiction of Federal Court – Whether challenge of constitutionality on inconsistency grounds pertained to matters dealt with by High Court – Whether High Court exercised discretion judicially and properly addressed its mind on applicable test not to refer constitutional questions to Federal Court – Failure to fulfil necessary threshold for grant of leave – Whether requirement of s. 96 of Courts of Judicature Act 1964 met – Dato' Seri Anwar Ibrahim v. Government Of Malaysia & Another – Federal Constitution, arts. 4(3), 4(4), 128(1), 128(2) – Courts of Judicature Act 1964, s. 84*

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CIVIL PROCEDURE: *Jurisdiction – Federal Court – Reference of constitutional questions to Federal Court – Whether constitutional questions fell exclusively within jurisdiction of Federal Court – Whether High Court should normally determine questions at first instance – Whether Federal Court last resort in respect of constitutional issues, except those falling within its narrowly construed original jurisdiction – Whether High Court exercised discretion judicially and properly addressed its mind on applicable test not to refer constitutional questions to Federal Court – Dato' Seri Anwar Ibrahim v. Government Of Malaysia & Another – Federal Constitution, arts. 4(3), 4(4), 128(1), 128(2) – Courts of Judicature Act 1964, s. 84*

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I

The Malaysian Bar ('Bar') applied for leave to appeal under s. 96 of the Courts of Judicature Act 1964 ('CJA') against the decision of the Court of Appeal in affirming the decision of the High Court that dismissed the Bar's application for reference of 27 constitutional questions to the Federal Court pursuant to art. 128 of the Federal Constitution ('FC') and/or s. 84 of the CJA. The first respondent was the then Prime Minister of Malaysia and the second respondent was the Government of Malaysia ('respondents'). The High Court dismissed the reference application, essentially on the ground that the questions raised were not constitutional questions that fell exclusively within the jurisdiction of the Federal Court alone to answer. The challenge of constitutionality as mounted by the Bar on the inconsistency grounds pertained to matters that could be dealt with by the High Court. On appeal, the Court of Appeal affirmed the decision of the High Court. One of the main grounds for dismissing the appeal was that the High Court had not committed any appealable error in refusing to refer the questions posed, to the Federal Court. The Court of Appeal was of the view that on the inconsistency challenge such as the present case, the High Court was seized with the jurisdiction to hear and determine the matter. Dissatisfied, the Bar filed leave to appeal. The Bar raised six questions of law ('QOL') (i) whether in a reference under s. 84(1) of the CJA read with art. 128(2) of the FC, the proposition that only the Federal Court has the jurisdiction to determine a question as to the effect of any provision of the FC as held by the Federal Court in *Gan Boon Aun v. PP* ('*Gan Boon Aun*') applies in view of the later decision of the Federal Court in *Dato' Seri Anwar Ibrahim v. Government of Malaysia & Another* ('*Anwar Ibrahim*') that held that both the High Court and the Federal Court have the jurisdiction to determine such questions ('QOL1'); (ii) whether the only matters that are within the jurisdiction of the Federal Court to warrant a reference under s. 84(1) of the CJA are matters that relate to questions of legislative competence under arts. 4(3), 4(4) and 128(1) of the FC ('QOL2'); (iii) whether the matters that warrant determination in an application for reference under s. 84(1) of the CJA read with art. 128(2) of the FC are limited to the following: (a) whether the proposed constitutional questions in the proceedings at the High Court relate to the effect of any provision of the FC; and (b) whether the determination of the proposed constitutional questions would result in the economical and speedy disposal of the proceedings at the High Court ('QOL3'); (iv) whether the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law are matters that should be considered in determining an application for reference under s. 84(1) of the CJA read with art. 128(2) of the FC ('QOL4'); (v) whether on a true interpretation of art. 128(2) of the FC read with ss. 81 and 84(1) of the CJA, the Federal Court could exercise the jurisdiction of the High Court to decide whether the questions that relate to the effect of the

provisions of the FC could be determined by the Federal Court, without remitting the matter back to the High Court ('QOL5'); and (vi) in the event QOL5 was answered in the affirmative, whether the following questions that relate to the effect of the provisions of the FC should be referred to the Federal Court under ss. 81 and 84(1) of the CJA read with art. 128(2) of the FC for the Federal Court to determine the said questions: (questions 1 to 27 in the reference application) ('QOL6'). The QOL were divided into three main groups based on the commonality of the provisions of law in issue and the pith and substance points posited in the questions (i) QOL1 to 3 concerned the nature and scope of the reference of constitutional question in s. 84 of the CJA read together with art. 128(1) and (2), and with art. 4(3) and (4) of the FC; (ii) QOL4 was related to the alleged differences of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law as a factor to be considered in determining the reference application; and (iii) QOL5 to 6 dealt with the jurisdiction and power of the Federal Court in deciding the questions relating to the effect of the provisions of the FC without remitting the matter back to the High Court.

Held (dismissing leave application in encl. 1)
Per Abang Iskandar Abang Hashim PCA delivering the judgment of the court:

(1) There is no conflict, either latent or apparent, in the cases of *Gan Boon Aun, Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors*, *Mohd Khairul Azam Abdul Aziz v. Menteri Pendidikan Malaysia & Anor*, and *Anwar Ibrahim*. The Federal Court in *Anwar Ibrahim* had clarified the law on reference to the Federal Court. *Anwar Ibrahim* did not hold that only the constitutional questions premised on the competency challenge point could be referred to the Federal Court. Nevertheless, *Anwar Ibrahim* went on to explain that the High Court 'should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court' as there was no obligation on the part of the High Court, by virtue of the word 'may' in s. 84, to refer any constitutional question arising before it to the Federal Court. Hence, the reference jurisdiction was not to be exercised automatically or invariably in every case. This understanding was consistent with *Gin Poh*, *Ah Thian* and *Khairul Azam*. In essence, where there is inconsistency challenge, the High Court has the jurisdiction to decide on such constitutional challenge so premised. (para 15)

(2) As such, when the High Court exercised its discretion by not referring the 27 questions to the Federal Court because it was empowered to decide on them, that reason alone was valid and could find more than

ample support from the Federal Court decisions. The High Court in such a circumstance could not then be said to have not exercised its discretion judicially or that it had not properly addressed its mind on the applicable test not to refer the constitutional questions to the Federal Court, when it had, in fact, addressed its mind sufficiently to many authorities. QOL1 to 3 failed to fulfill the necessary threshold for the grant of leave, in that, the meaning, nature and scope of reference to Federal Court is well established. The Bar failed to show that there existed a gap in the law that would necessitate the grant of leave for questions relating to the meaning and application of s. 84 of the CJA read together with art. 128(1) and (2), and art. 4(3) and (4) of the FC. (para 17)

(3) The majority in *Anwar Ibrahim* ruled on the principles to be considered on the referral jurisdiction of the Federal Court (i) the referral jurisdiction in art. 128(2) of the FC and s. 84 of the CJA forms part of the constitutional framework, and must be construed in its light; (ii) the Federal Court is the court of last resort in respect of constitutional issues, except those falling within its narrowly construed original jurisdiction; (iii) s. 84 does not fundamentally change the nature of the Federal Court into a constitutional court. It is not a *carte blanche* for all constitutional questions to be referred to and determined by the Federal Court in every case. The High Court should normally determine constitutional questions themselves at first instance; and (iv) where a special case is referred to the Federal Court under s. 84, the Federal Court is not obliged to answer it in the terms posed, but retains a wide range of powers to deal with it in the same way as an appeal. The matters for consideration when determining the reference application had been explained in *Anwar Ibrahim* and it did not require any further ventilation on the terms as proposed in the QOL. The QOL4, in the way it was currently framed, was imprecise as to the 'principle' in question. The QOL ought to be clear so as to avoid leaving this court in a state of limbo, as to what it actually entailed or sought the Federal Court to answer. Without sufficient precision in the framed QOL, it was not appropriate for this court to venture to answer the question in the manner it was framed. *Prima facie*, therefore, QOL4 did not merit the grant of leave. (paras 24-27)

(4) As regards s. 81 of the CJA, apart from spelling out the jurisdiction and powers of the Federal Court, states what is obvious. What it does not say was that, it did not obligate the Federal Court to answer any constitutional question referred to it, more so, the inconsistency questions, although the Federal Court was clothed with the necessary jurisdiction similar to that of the High Court. Section 81 of the CJA provides, *inter alia*, that the Federal Court 'shall have the same

jurisdiction and may exercise the same powers as are had and may be exercised by the High Court.' The word 'may' therein was clearly a permissive choice, implying some degree of discretion. Hence, the proposed QOL5 and QOL6 were not questions that fulfilled the necessary threshold for the grant of leave to appeal. (para 30)

(5) The analysis of the proposed QOL was that they were essentially proposing to this court to relook into the meaning, application and scope of s. 84 of the CJA, read with art. 128(2) of the Federal Constitution. *Anwar Ibrahim* and all the cited cases had comprehensively dealt with the matter. The Bar had failed to satisfy this court as to where and what the gaps were in those cited cases to merit the grant of leave. The threshold requirement of s. 96 of the CJA had not been met. (paras 33 & 34)

Bahasa Melayu Headnotes

Badan Peguam Malaysia ('Badan Peguam') memohon kebenaran untuk merayu bawah s. 96 Akta Mahkamah Kehakiman 1964 ('AMK') terhadap keputusan Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi menolak permohonan Badan Peguam merujuk 27 soalan-soalan perlembagaan pada Mahkamah Persekutuan menurut per. 128 Perlembagaan Persekutuan ('PP') dan/atau s. 84 AMK. Responden pertama ialah Perdana Menteri Malaysia ketika itu dan responden kedua ialah Kerajaan Malaysia ('responden-responden'). Mahkamah Tinggi menolak permohonan rujukan, pada asasnya, atas alasan bahawa soalan-soalan yang dibangkitkan bukanlah persoalan perlembagaan yang terangkum secara eksklusif dalam bidang kuasa Mahkamah Persekutuan sahaja untuk diputuskan. Cabaran perlembagaan seperti yang dikemukakan oleh Badan Peguam atas alasan ketidakkonsistenan berkaitan dengan perkara yang boleh ditangani oleh Mahkamah Tinggi. Semasa rayuan, Mahkamah Rayuan mengesahkan keputusan Mahkamah Tinggi. Salah satu alasan utama menolak rayuan adalah bahawa Mahkamah Tinggi tidak melakukan sebarang kesilapan yang boleh dirayu apabila menolak untuk merujuk soalan yang dikemukakan pada Mahkamah Persekutuan. Mahkamah Rayuan berpandangan bahawa atas cabaran ketidakkonsistenan seperti kes ini, Mahkamah Tinggi mempunyai bidang kuasa mendengar dan menentukan perkara itu. Tidak berpuas hati, Badan Peguam memfailkan kebenaran untuk merayu. Badan Peguam membangkitkan enam persoalan undang-undang (i) sama ada dalam rujukan bawah s. 84(1) AMK dibaca bersama-sama dengan per. 128(2) PP, cadangan bahawa hanya Mahkamah Persekutuan mempunyai bidang kuasa untuk menentukan persoalan tentang kesan mana-mana peruntukan PP seperti yang diputuskan oleh Mahkamah Persekutuan dalam *Gan Boon Aun v. Pendakwa Raya* ('*Gan Boon Aun*') terpakai memandangkan keputusan Mahkamah

Persekutuan kemudian dalam kes *Dato' Seri Anwar Ibrahim lwn. Kerajaan Malaysia & Satu Lagi* ('*Anwar Ibrahim*') yang berpendapat bahawa kedua-dua Mahkamah Tinggi dan Mahkamah Persekutuan mempunyai bidang kuasa untuk menentukan soalan tersebut ('soalan 1'); (ii) sama ada satu-satunya perkara dalam bidang kuasa Mahkamah Persekutuan untuk menjamin rujukan bawah s. 84(1) AMK adalah yang berkaitan dengan persoalan kecekapan perundangan bawah per. 4(3), 4(4) dan 128(1) PP ('soalan 2'); (iii) sama ada perkara yang memerlukan penentuan dalam permohonan rujukan bawah s. 84(1) AMK dibaca dengan per. 128(2) PP terhad pada yang berikut: (a) sama ada persoalan perlembagaan yang dicadangkan dalam prosiding di Mahkamah Tinggi berkaitan dengan kesan mana-mana peruntukan PP; dan (b) sama ada penentuan soalan perlembagaan yang dicadangkan akan menyebabkan pelupusan prosiding yang menjimatkan dan cepat di Mahkamah Tinggi ('soalan 3'); (iv) sama ada perbezaan pandangan di Mahkamah Persekutuan mengenai pemakaian prinsip undang-undang perlembagaan atau keperlembagaan prinsip undang-undang adalah perkara yang perlu dipertimbangkan dalam menentukan permohonan rujukan bawah s. 84(1) AMK dibaca bersama-sama dengan per. 128(2) PP ('soalan 4'); (v) sama ada atas tafsiran sebenar per. 128(2) PP dibaca bersama-sama dengan ss. 81 dan 84(1) AMK, Mahkamah Persekutuan boleh menjalankan bidang kuasa Mahkamah Tinggi untuk memutuskan sama ada soalan yang berkaitan dengan kesan peruntukan PP boleh ditentukan oleh Mahkamah Persekutuan, tanpa menyerahkan semula perkara itu ke Mahkamah Tinggi ('soalan 5'); (vi) sekiranya soalan 5 dijawab secara afirmatif, sama ada soalan berikut yang berkaitan dengan kesan peruntukan PP perlu dirujuk pada Mahkamah Persekutuan bawah s. 81 dan s. 84(1) AMK dibaca bersama-sama dengan per. 128(2) PP untuk Mahkamah Persekutuan menentukan soalan-soalan tersebut: (soalan 1 hingga 27 dalam permohonan rujukan) ('soalan 6'). Soalan-soalan perundangan dibahagikan pada tiga kumpulan utama berdasarkan kesamaan isu dan intipati peruntukan undang-undang yang dikemukakan dalam soalan-soalan tersebut; (i) soalan 1 hingga 3 melibatkan sifat dan skop rujukan soalan perlembagaan bawah s. 84 AMK dibaca bersama-sama dengan per. 128(1) dan (2), dan dengan per. 4(3) dan (4) PP; (ii) soalan 4 berkaitan dengan dakwaan perbezaan pandangan di Mahkamah Persekutuan mengenai pemakaian prinsip undang-undang perlembagaan atau keperlembagaan prinsip undang-undang sebagai faktor yang perlu dipertimbangkan dalam menentukan permohonan rujukan; dan (iii) soalan 5 hingga 6 berkait dengan bidang kuasa dan kuasa Mahkamah Persekutuan dalam memutuskan soalan yang berkaitan dengan kesan peruntukan PP tanpa mengembalikan semula perkara itu ke Mahkamah Tinggi.

Diputuskan (menolak permohonan kebenaran dalam lamp. 1)
Oleh Abang Iskandar Abang Hashim PMR menyampaikan penghakiman mahkamah:

(1) Tiada konflik, sama ada terpendam atau nyata, dalam kes *Gan Boon Aun, Gin Poh Holdings Sdn Bhd v. Kerajaan Negeri Pulau Pinang & Ors, Mohd Khairul Azam Abdul Aziz v. Menteri Pendidikan Malaysia & Anor*, dan *Anwar Ibrahim*. Mahkamah Persekutuan dalam *Anwar Ibrahim* telah menjelaskan undang-undang berkaitan rujukan ke Mahkamah Persekutuan. *Anwar Ibrahim* tidak berpendirian bahawa hanya persoalan perlembagaan yang berasaskan titik cabaran kompetensi boleh dirujuk ke Mahkamah Persekutuan. Namun begitu, *Anwar Ibrahim* seterusnya menjelaskan bahawa Mahkamah Tinggi 'seharusnya secara am dan lazimnya menentukan persoalan perlembagaan pada peringkat pertama, kecuali soalan-soalan dalam bidang kuasa asal Mahkamah Persekutuan' kerana tidak ada kewajipan di pihak Mahkamah Tinggi, menurut kuasa perkataan 'may' dalam s. 84 untuk merujuk sebarang persoalan perlembagaan yang timbul di hadapannya ke Mahkamah Persekutuan. Oleh itu, bidang kuasa rujukan tidak boleh dilaksanakan secara automatik atau selalu dalam setiap kes. Pemahaman ini konsisten dengan kes-kes *Gin Poh*, *Ah Thian* dan *Khairul Azam*. Pada dasarnya, apabila terdapat cabaran ketidakkonsistenan, Mahkamah Tinggi mempunyai bidang kuasa untuk memutuskan cabaran perlembagaan sedemikian dalam cara tu.

(2) Oleh itu, apabila Mahkamah Tinggi menggunakan budi bicaranya dengan tidak merujuk 27 soalan tersebut ke Mahkamah Persekutuan kerana diberi kuasa untuk memutuskannya, alasan itu sahaja adalah sah dan ini disokong sepenuhnya oleh keputusan-keputusan Mahkamah Persekutuan. Mahkamah Tinggi dalam keadaan sedemikian tidak boleh dikatakan tidak menggunakan budi bicaranya secara kehakiman atau tidak mempertimbangkan sewajarnya ujian yang terpakai untuk tidak merujuk soalan perlembagaan ke Mahkamah Persekutuan, sedangkan sebenarnya telah mempertimbangkan secukupnya beberapa autoriti. Soalan 1 hingga 3 gagal memenuhi ambang yang diperlukan untuk kebenaran, kerana makna, sifat dan skop rujukan ke Mahkamah Persekutuan adalah mantap. Badan Peguam gagal menunjukkan bahawa wujud kelopongan dalam undang-undang yang memerlukan pemberian kebenaran untuk soalan yang berkaitan dengan maksud dan pemakaian s. 84 AMK yang dibaca bersama-sama dengan per. 128(1) dan (2), dan per. 4(3) dan (4) PP.

(3) Majoriti dalam kes *Anwar Ibrahim* memutuskan prinsip yang perlu dipertimbangkan dalam bidang kuasa rujukan Mahkamah Persekutuan (i) bidang kuasa rujukan dalam per. 128(2) PP dan s. 84 AMK membentuk sebahagian rangka kerja perlembagaan, dan mesti ditafsirkan menurut itu; (ii) Mahkamah Persekutuan ialah mahkamah

pilihan terakhir berkenaan dengan isu perlembagaan, kecuali dalam bidang kuasa asalnya yang ditafsirkan secara ketat; (iii) s. 84 pada asasnya tidak mengubah sifat Mahkamah Persekutuan menjadi mahkamah perlembagaan. Bukanlah satu *carte blanche* untuk semua persoalan perlembagaan dirujuk dan ditentukan oleh Mahkamah Persekutuan dalam setiap kes. Mahkamah Tinggi biasanya harus menentukan sendiri persoalan perlembagaan pada peringkat pertama; dan (iv) jika sesuatu kes khas dirujuk ke Mahkamah Persekutuan bawah s. 84, Mahkamah Persekutuan tidak bertanggungjawab untuk menjawabnya dalam terma yang dikemukakan, tetapi mengekalkan pelbagai kuasa untuk menanganinya dengan cara yang sama seperti rayuan. Perkara untuk dipertimbangkan semasa menentukan permohonan rujukan telah dijelaskan dalam kes *Anwar Ibrahim* dan tidak memerlukan apa-apa penjelasan lanjut mengenai terma seperti yang dicadangkan dalam soalan perundangan. Soalan 4, dalam cara dirangka pada masa ini, tidak tepat tentang 'prinsip' yang dipersoalkan. Soalan-soalan perundangan sepatutnya jelas untuk mengelak mahkamah ini dalam keadaan terawang-awang, tentang apa yang sebenarnya diperlukan daripada atau meminta Mahkamah Persekutuan menjawab. Tanpa ketepatan yang mencukupi dalam cara soalan dirangka, tidak wajar untuk mahkamah ini berusaha menjawab soalan mengikut cara itu dirangka. *Prima facie*, oleh itu, soalan 4 wajar layak diberi kebenaran.

(4) Selain daripada menyatakan bidang kuasa dan kuasa Mahkamah Persekutuan, s. 18 AMK menyatakan apa yang jelas. Apa yang tidak dinyatakannya ialah, ia tidak mewajibkan Mahkamah Persekutuan menjawab apa-apa soalan perlembagaan yang dirujuk padanya, lebih-lebih lagi persoalan ketidakkonsistenan, walaupun Mahkamah Persekutuan mempunyai bidang kuasa yang sama seperti Mahkamah Tinggi. Seksyen 81 AMK memperuntukkan, antara lain, bahawa Mahkamah Persekutuan 'shall have the same jurisdiction and may exercise the same powers as are had and may be exercised by the High Court.' Perkataan 'may' dengan jelasnya adalah pilihan permisif, menggambarkan beberapa tahap budi bicara. Oleh itu, soalan 5 dan 6 yang dicadangkan bukanlah soalan yang memenuhi ambang yang diperlukan untuk pemberian kebenaran merayu.

(5) Apabila dianalisa soalan-soalan perundangan yang dicadangkan, itu pada dasarnya mencadangkan pada mahkamah ini untuk meneliti semula maksud, pemakaian dan skop s. 84 AMK, dibaca bersama-sama dengan per. 128(2) PP. *Anwar Ibrahim* dan semua kes-kes yang disebut telah menangani perkara itu secara menyeluruh. Badan Peguam gagal untuk memuaskan mahkamah ini tentang di mana dan apakah kelopongan dalam kes-kes yang disebut itu untuk mendapatkan kebenaran. Keperluan ambang s. 96 AMK tidak dipenuhi.

Case(s) referred to:

Ah Thian v. Government Of Malaysia [1976] CLJU 3; [1976] 1 LNS 3 FC ***(refd)***

Dalip Bhagwan Singh v. PP [1997] 4 CLJ 645 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad [2001] 1 CLJ 663 FC ***(refd)***

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 3 CLJ 593 FC ***(refd)***

Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors [1999] 1 CLJ 325 FC ***(refd)***

Gan Boon Aun v. PP [2016] 6 CLJ 647 FC ***(refd)***

Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors [2018] 4 CLJ 1 FC ***(refd)***

Mohd Khairul Azam Abdul Aziz v. Menteri Pendidikan Malaysia & Anor [2020] 9 CLJ 309 FC ***(refd)***

Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor and other applications [2011] 1 MLJ 25 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, ss. 81, 84(1), 96

Federal Constitution, arts. 4(3), (4), 5, 8, 40(1), 121, 128(1), (2), 150(1), (2B), (3), (6), (7), (8)

For the applicant - Steven Thiru, Abdul Rashid Ismail, Gregory Das, Henna Nikita Sanghvi & Nadiah Humairah Sudirman

For the respondents - Rahazlan Affandi Abdul Rahim & Liew Horng Bin & Nur Syazwani Abdul Aziz; SFC

Reported by Suhainah Wahiduddin

JUDGMENT

Abang Iskandar Abang Hashim PCA:

The Facts And The Antecedent Proceedings

[1] Malaysian Bar ('the Bar') in this case applied for leave to appeal under s. 96 of the Courts of Judicature Act 1964 ('CJA') against the decision of the Court of Appeal ('COA') in affirming the decision of the High Court ('HCT') that dismissed the bar's application for reference of 27 constitutional questions to the Federal Court pursuant to art. 128 of the Federal Constitution ('FC') and/or s. 84 of the CJA. The first respondent is the then Prime Minister of Malaysia, and the second respondent is the Government of Malaysia (collectively as 'the respondents').

[2] The 27 questions can be broadly divided into six major categories dealing with:

(i) constitutionality of art. 150 of the FC *vis-à-vis* the basic structure of the FC;

(ii) constitutionality of arts. 150(6) and (8) of the FC *vis-à-vis* arts. 4, 5, 8 and 121 of the FC, and the basic structure of the FC;

(iii) constitutionality of the various provisions in the promulgated Emergency Ordinances *vis-à-vis* several articles in the FC;

(iv) the interpretation of art. 150(3) of the FC on the constitutional duty of the respondents to forthwith advise the Yang di-Pertuan Agong ("YDPA") to summon a meeting of Parliament for (i) the Proclamation of Emergency; and (ii) the various Emergency Ordinances, to be laid before both Houses of Parliament and for all necessary and appropriate resolutions to be passed;

(v) the interpretation of art. 150(1) read with art. 150(2B), (3) and (7) of the FC in respect of the power to revoke or annul the Emergency Ordinances; and

(vi) the interpretation of art. 40(1) of the FC on the obligation of the YDPA to act on advice in respect of the continuance or revocation of Emergency Ordinances.

[3] The first three categories (i) to (iii) are questions of constitutionality that are expressly stated to be inconsistent, either to (i) the basic structure of the FC, and/or (ii) the various articles in the FC. In other words, it was never the case of the Bar that the 27 questions are premised on competency challenge.

[4] The HCT dismissed the reference application, essentially on the ground that those questions were not constitutional questions that fell exclusively within the jurisdiction of the Federal Court alone to answer. The challenge of constitutionality as mounted by the Bar on the inconsistency grounds pertained to matters that can be dealt with by the High Court following the decisions of the Federal Court in several cases, including *Ah Thian v. Government Of Malaysia* [1976] CLJU 3; [1976] 1 LNS 3; [1976] 2 MLJ 112 ('*Ah Thian*'); *Gin Poh Holdings Sdn Bhd v. The Government Of The State Of Penang & Ors* [2018] 4 CLJ 1; [2018] 3 MLJ 417 ('*Gin Poh*'); *Mohd Khairul Azam Abdul Aziz v. Menteri Pendidikan Malaysia & Anor* [2020] 9 CLJ 309; [2020] 1 MLJ 398 ('*Khairul Azam*'); and *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 3 CLJ 593; [2020] 4 MLJ 133 ('*Anwar Ibrahim*').

[5] On appeal, the COA affirmed the decision of the HCT. One of the main grounds for dismissing the appeal was that the HCT had not committed any appealable error in refusing to refer the questions posed, to the Federal Court. The COA was of the view that on the inconsistency challenge such as the present case, the HCT was seized with the jurisdiction to hear and determine the matter.

Notwithstanding, the COA viewed that the HCT "retains a discretion to refer a question to the Federal Court under s. 84 of the Courts of Judicature Act 1964 even in circumstances where the matter does not fall within the exclusive original jurisdiction of the Federal Court, but this discretion must be exercised sparingly."

[6] Dissatisfied, the bar filed leave to appeal. Originally, there were 32 proposed questions of law ("QOL") as stated in the notice of motion. However, the Bar had revised the QOL to 6 QOL only. One of the 6 revised QOL is directly concerned with the 27 reference questions mentioned above. The 6 revised QOL read:

(i) whether in a reference under s. 84(1) of the Courts of Judicature Act 1964 read with art. 128(2) of the Federal Constitution, the proposition that only the Federal Court has the jurisdiction to determine a question as to the effect of any provision of the Federal Constitution as held by the Federal Court in *Gan Boon Aun v. Public Prosecutor* [2016] 6 CLJ 647 applies in view of the later decision of the Federal Court in *Dato' Seri Anwar Ibrahim v. Government of Malaysia & Another* [2020] 3 CLJ 593 that held that both the High Court and the Federal Court have the jurisdiction to determine such questions?

(ii) whether the only matters that are within the jurisdiction of the Federal Court to warrant a reference under s. 84(1) of the Courts of Judicature Act 1964 are matters that relate to questions of legislative competence under art. 4(3), 4(4) and art. 128(1) of the Federal Constitution?

(iii) whether the matters that warrant determination in an application for reference under s. 84(1) of the Courts of Judicature Act 1964 read with art. 128(2) of the Federal Constitution are limited to the following:

(a) whether the proposed constitutional questions in the proceedings at the High Court relate to the effect of any provision of the Federal Constitution; and

(b) whether the determination of the proposed constitutional questions would result in the economical and speedy disposal of the proceedings at the High Court?

(iv) whether the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law are matters that should be considered in determining an application for reference under s. 84(1) of the Courts of Judicature Act 1964 read with art. 128(2) of the Federal Constitution?

(v) whether on a true interpretation of art. 128(2) of the Federal Constitution read with ss. 81 and 84(1) of the Courts of Judicature Act 1964, the Federal Court can exercise the jurisdiction of the High Court to decide whether the questions that relate to the effect of the provisions of the Federal Constitution could be determined by the Federal Court, without remitting the matter back to the High Court?

(vi) in the event question 5 above is answered in the affirmative, whether the following questions that relate to the effect of the provisions of the Federal Constitution should be referred to the Federal Court under ss. 81 and 84(1) of the Courts of Judicature Act 1964 read with art. 128(2) of the Federal Constitution for the Federal Court to determine the said questions: (questions 1 to 27 in the reference application).

The Threshold For Leave

[7] The required threshold for leave to appeal had been settled by the Federal Court in *Terengganu Forest Products Sdn Bhd v. Cosco Container Lines Co Ltd & Anor And Other Applications* [2011] 1 CLJ 51; [2011] 1 MLJ 25. There, the Federal Court accepted as correct, the principles laid down in *Datuk Syed Kechik Syed Mohamed & Anor v. The Board Of Trustees Of The Sabah Foundation & Ors* [1999] 1 CLJ 325; [1999] 1 MLJ 257.

[8] As observed in *Terengganu Forest*, an applicant, seeking leave to appeal has a heavy burden to discharge in proving the threshold under s. 96 of the CJA, a specific provision regulating the conditions of appeal to the Federal Court. There are two situations where leave is required. They must be:

(i) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and decision of the Federal Court would be to public advantage; or

(ii) from any decision as to the effect of any provision of the Federal Constitution including the validity of any written law relating to any such provision.

Our Decision

[9] We first identify under which limb of s. 96 of the CJA that the proposed QOL could pass the required threshold. Limb (b) is, in our view, inapplicable as there is no decision yet made by the courts below on the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

[10] As for limb (a), it must be shown to us that the proposed QOL involves a question of general principle decided for the first time or it being a question of importance to public advantage. In this regard, we are satisfied that the law on reference of constitutional questions to the Federal Court is well settled, requiring no further ventilation at the Federal Court. Our reasons are as set out below.

A **Analysis Of The Leave Questions**

[11] Having analysed the six revised QOL, we went on to divide those QOL into three main groups based on the commonality of the provisions of law in issue and the pith and substance points posited in those questions. They are:

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(i) QOL 1 to 3 concern the nature and scope of the reference of constitutional question in s. 84 of the CJA read together with art. 128(1) and (2); and with art. 4(3) and (4) of the Federal Constitution;

(ii) QOL 4 relates to the alleged differences of views at the Federal Court C on the application of a principle of constitutional law or the constitutionality of a principle of law as a factor to be considered in determining the reference application; and

(iii) QOL 5 to 6 deal with the jurisdiction and power of the Federal Court in deciding the questions relating to the effect of the provisions of the D FC without remitting the matter back to the HCT.

Nature And Scope Of Reference To The Federal Court (QOL 1-3)

[12] First and foremost, we observed and it needs reiteration that the HCT in this case was aware of what was decided by the Federal Court in *Gan Boon* E *Aun v. Public Prosecutor* [2016] 6 CLJ 647 ('*Gan Boon Aun*') in that only the Federal Court is empowered to determine a question as to the effect of any provision of the Constitution, and that the HCT did not have such power.

[13] That said, the HCT acknowledged that the Federal Court had, in the later decisions in *Gin Poh*, *Khairul Azam* and *Anwar Ibrahim*, held that the F HCT has the jurisdiction to deal with inconsistency challenges of the constitutional provisions. With that understanding, the HCT refused the Bar's reference application.

[14] Reverting to the issue before us, the Bar seems to suggest that in view of the differences of opinion on reference to the Federal Court, between *Gan* G *Boon Aun* on the one hand and *Anwar Ibrahim* on the other, there is the need for the Federal Court to clarify and state the correct position in law. In essence, the Bar is of the view that the nature and scope of the reference to the Federal Court are still vague and ambiguous. The respondents on the other hand argued that there is no conflict between *Gan Boon Aun* and *Anwar* H *Ibrahim* on this matter and that the law relating to reference to Federal Court is well settled by the subsequent decisions of the Federal Court as mentioned above, with the latest decision being that of *Anwar Ibrahim*.

[15] We have examined *Gan Boon Aun*, *Gin Poh*, *Khairul Azam* and *Anwar Ibrahim*, and we found there is no conflict, either latent or apparent. The I Federal Court in *Anwar Ibrahim* had clarified the law on reference to Federal Court. *Anwar Ibrahim* did not hold that only the constitutional questions

premised on the competency challenge point can be referred to the Federal Court. Nevertheless, *Anwar Ibrahim* went on to explain that the HCT "should generally and ordinarily determine constitutional questions at first instance, barring those within the original jurisdiction of the Federal Court" as there is no obligation on the part of the HCT, by virtue of the word "may" in s. 84 to refer any constitutional question arising before it to the Federal Court. Hence, the reference jurisdiction is not to be exercised automatically or invariably in every case. This understanding is consistent with *Gin Poh*, *Ah Thian* and *Khairul Azam*. In fact, Justice Azahar Mohamed, CJ (Malaya) who penned the grounds of judgment in *Khairul Azam*, was one of the panel members in *Gan Boon Aun*. In essence, where there is inconsistency challenge, such as the present case, the HCT has the jurisdiction to decide on such constitutional challenge so premised.

[16] As such, when the HCT exercised its discretion by not referring the 27 questions to the Federal Court because it was empowered to decide on them, that reason alone was valid and could find more than ample support from the Federal Court decisions as cited and discussed above. The HCT in such a circumstance cannot then be said to have not exercised its discretion judicially or that it had not properly addressed its mind on the applicable test not to refer the constitutional questions to the Federal Court, when it had, in fact addressed its mind sufficiently to many authorities as cited in its judgment.

[17] In short, we are of the view that QOL 1 to 3 failed to fulfil the necessary threshold for the grant of leave, in that, the meaning, nature and scope of reference to Federal Court is well established and clarified in the authorities cited above. The Bar had failed to show us that there existed a gap in the law that would necessitate the grant of leave for questions relating to the meaning and application of s. 84 of the CJA read together with art. 128(1) and (2), and art. 4(3) and (4) of the Federal Constitution.

[18] As was held in *Terengganu Forest*, "the purpose of s. 96 is not to allow for correction of ordinary errors committed by the lower courts as would in an appeal as of right, particularly where the relevant laws are well settled."

[19] Furthermore, *Anwar Ibrahim* case is a recent decision of this court and we do not see any cogent reason to depart from what to our mind is a sound and well-reasoned judgment, and deserving of due deference. In *Dalip Bhagwan Singh v. PP* [1997] 4 CLJ 645, this court ruled that:

> If the House of Lords, and by analogy, the Federal Court, departs from its previous decision when it is right to do so in the circumstances set out above, then also by necessary implication, its decision represents the present state of the law. When two decisions of the Federal Court conflict, on a point of law, the later decision therefore, for the same reasons, prevails over the earlier decision.

A **Difference Of Views As A Determining Factor In Reference Application (QOL 4)**

[20] At the risk of repetition, the proposed QOL4 asks:

> Whether the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law are matters that should be considered in determining an application for reference under Section 84(1) of the Courts of Judicature Act 1964 read with Article 128(2) of the Federal Constitution?

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[21] This proposed QOL revolves around the requisite factor to be considered in an application for reference. And the stated requisite proposed factor in the QOL is the existence of a difference of views at the Federal Court on the application of a principle of constitutional law or the constitutionality of a principle of law.

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[22] What had captured our attention when we first looked at the proposed QOL 4, had been the phrase "a principle of constitutional law or the constitutionality of a principle of law". Without the benefit of the parties' submissions, the QOL is rather vague and ambiguous. The QOL seems to suggest that the existence of a difference of views on the matters stated therein should be considered in determining the reference application.

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E **[23]** The Bar, in its submissions referred to two matters – the application of the doctrine of basic structure; and the ouster clause. These matters are what the Bar submitted to be the factors to be considered in determining an application for reference as this apex court seems to have differing views on their application as well as their constitutionality. The respondents on the other hand argued that *Anwar Ibrahim* has ruled on the matters governing the reference application.

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[24] The majority in *Anwar Ibrahim* whilst acknowledging that s. 84 of the CJA does not expressly indicate the factors to be considered in determining whether a case is suitable to be referred to and determined by the Federal Court, it nevertheless ruled on the principles to be considered on the referral jurisdiction of the Federal Court. It held that:

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> To summarise, the following principles should be borne in mind when considering the referral jurisdiction of the Federal Court:
>
> (a) the referral jurisdiction in art. 128(2) of the FC and s. 84 of the CJA forms part of the constitutional framework, and must be construed in its light;
>
> (b) the Federal Court is the court of last resort in respect of constitutional issues, except those falling within its narrowly construed original jurisdiction;

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(c) s. 84 does not fundamentally change the nature of the Federal Court into a constitutional court. It is not a carte blanche for all constitutional questions to be referred to and determined by the Federal Court in every case. The High Court should normally determine constitutional questions themselves at first instance; and

(d) where a special case is referred to the Federal Court under s. 84, the Federal Court is not obliged to answer it in the terms posed, but retains a wide range of powers to deal with it in the same way as an appeal.

[25] Thus, based on the above, we agree with the respondents that the matters for consideration when determining the reference application has been explained in *Anwar Ibrahim* and it does not require any further ventilation on the terms as proposed in the QOL.

[26] Furthermore, even if there exists a difference of views on any matters at the apex court, the view that is most recently expressed by it would prevail. This court in *Dalip Bhagwan Singh* has given a clear pronouncement to that effect. As such, on what to consider in determining whether to refer constitutional questions to the Federal Court under s. 84 of the CJA, *Anwar Ibrahim* is the latest authority.

[27] Importantly, as stated earlier, the proposed QOL, in the way it is currently framed is imprecise as to the "principle" in question. The QOL ought to be clear so as to avoid leaving this court in a state of limbo, as to what it actually entails or seeks the Federal Court to answer. Without sufficient precision in the framed QOL, we do not think it is appropriate for us to venture to answer the question in the manner it is presently framed. *Prima facie*, therefore, QOL 4 does not merit the grant of leave.

To Remit Or Not To Remit Is The Question

[28] QOL 5 and 6 are new questions raised by the Bar for our determination. In essence, they concern the power of this court, when dealing with the reference application, to exercise its power under s. 81 of the CJA, to decide the reference questions without remitting them back to the High Court.

[29] Firstly, we must highlight that the application of the cumulative reading of ss. 81, 84 and art. 128(2) of the FC was never an issue ventilated in the courts below. In any case, in respect of the power of this court in a s. 84 reference, *Anwar Ibrahim* has provided us with the answer.

[30] As regards s. 81 of the CJA, apart from spelling out the jurisdiction and powers of the Federal Court, to our mind, it states what is obvious. What it does not say is that, it does not obligate the Federal Court to answer any constitutional question referred to it, more so the inconsistency questions, although the Federal Court is clothed with the necessary jurisdiction similar

to that of the High Court. We reproduce s. 81 of the CJA which provides, *inter alia*, that the Federal Court "shall have the same jurisdiction and may exercise the same powers as are had and may be exercised by the High Court". The word "may" therein is clearly a permissive choice, implying some degree of discretion. Hence, the proposed QOL 5 and 6 are not questions that fulfilled the necessary threshold for the grant of leave to appeal.

***Prima Facie* Case For Success**

[31] One of the important factors for consideration in a leave application under s. 96 of the CJA is whether there is a *prima facie* case for success in the appeal (*Dato' Seri Anwar Ibrahim v. Dato' Seri Dr Mahathir Mohamad* [2001] 1 CLJ 663; [2001] 2 MLJ 65). In that case, the court explained that:

> In *Datuk Syed Kechik bin Syed Mohamed v. The Board of Trustees of the Sabah Foundation* [1999] 1 MLJ 257 at p 265, this court held that the Federal Court grants leave to appeal from the Court of Appeal sparingly and will not grant such leave unless the following criteria are satisfied by the intending appellant: (i) the judgment of the Court of Appeal has raised a point of general principle which the Federal Court has not previously decided or a point of importance upon which further argument and a decision of the Federal Court would be to public advantage; and (ii) if the point is decided in favour of the intending appellant, **there is a *prima facie* case for success in the appeal.** Regarding the second criterion, the court observed (at p. 262) that an assessment of the prospects of success should leave be given is, of course, an important factor which the Federal Court would have to take into account. It is however, not necessary for the intending appellant to demonstrate to the court the probability and a reasonable likelihood of the appeal succeeding in the event of leave being granted. All he needs to do is to show that on first impression, the appeal might succeed.
>
> In our view, the question which we formulated above raises a question of general principle not previously decided by the Federal Court. It comes under the first criterion of s. 96(a). However, Datuk Syed Kechik held that the two criteria of the section are not exclusive. *Hence, an assessment of the prospects of success should leave be granted is an important factor which the Federal Court would have to take into account.* On this point, we note that Mr. Karpal merely deposed in his supporting affidavit that 'if any or all issues raised are decided in the applicant's favour, there is a *prima facie* case for success in the appeal.' There was no submission made on this point to demonstrate that there is a *prima facie* case for success in the appeal.

[32] In the present application for leave before us, neither the affidavit in support, nor the written or oral submissions filed by the Bar addressed this important factor on the *prima facie* case for success of the appeal. Hence, leave ought to be rejected.

Conclusion

[33] Our analysis of all the proposed QOL is that they are essentially proposing to us to relook into the meaning, application and scope of s. 84 of the CJA, read with art. 128(2) of the FC. In our view, *Anwar Ibrahim* and all the cited cases above had comprehensively dealt with the matter. We find that the Bar had failed to satisfy us as to where and what the gaps are in those cited cases to merit the grant of leave.

[34] In the upshot, we are of the unanimous view that the threshold requirement of s. 96 of the CJA has not been met, with respect, by the Bar in this case, and as such, this leave application in encl. 1 ought to be and is dismissed with no order as to costs.